

<https://helda.helsinki.fi>

Persons and Things in International Law and "Law of Humanity"

Soirila, Ukri

2017

Soirila , U 2017 , ' Persons and Things in International Law and "Law of Humanity" ' ,
German law journal , vol. 18 , no. 5 , pp. 1163-1182 . <https://doi.org/10.1017/s207183220002229x>

<http://hdl.handle.net/10138/232604>

<https://doi.org/10.1017/s207183220002229x>

publishedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

Special Issue

Traditions, Myths, and Utopias of Personhood

Persons and Things in International Law and “Law of Humanity”

By Ukri Soirila*

Abstract

Drawing from Roberto Esposito’s recent work on persons and things, this Article studies recent attempts to rethink international legal personality. Esposito’s work resurrects the claim that personhood operates like a mask, splitting the legal and philosophical world into persons and things. International law differs from domestic law in that international legal personality has traditionally been the prerogative of states, not of (rational) individuals. Yet, this has not completely dismantled the persons/things logic, because the exclusive legal personality of states has continuously threatened to reduce individuals into things in the eyes of international law. It is perhaps for this reason that international legal theorists have long sought to extend international legal personality to individuals and other non-state actors. This Article addresses the most recent attempt, namely an attempt to shift international law towards a law of humanity. Without taking a stance on whether this project is a good idea or not, this Article raises some doubts about whether the concept of international legal personality can help in fulfilling the project’s aim, namely to help increase human freedom and well-being. This is especially relevant because, regardless of whether legal personality is attributed primarily to the state or the individual, we still remain—according to Esposito—within a theoretical framework in which the dispositif of person necessarily excludes some forms of life in protecting or empowering others.

* Doctoral candidate in law, University of Helsinki, The Erik Castrén Institute of International Law and Human Rights. The author wishes to thank Mikko Rajavuori and Toni Selkälä for their helpful comments on this piece.

A. Introduction

In his two recent works, Italian thinker Roberto Esposito has approached the history of Western philosophical and legal thought through the concept of the person, arguing that our conceptual world is based on a strict distinction between persons and things—a distinction that is the outcome of a long disciplinary process. As Esposito writes, “[a] watershed divides the world of life, cutting it into two areas defined by their mutual opposition. You either stand on this side of the divide, with the persons, or on the other side, with the thing: there is no segment in between to unite them.”¹ A thing is defined simply as that which is not a person and a person as a non-thing.² Further, and most disturbingly, the persons/things machine creates the assumption that things belong to persons.³

Perhaps even most interestingly, however, Esposito’s work reveals that the persons/things separation is not a fact that exists, but is actively produced by the “*dispositif*” of the person, which necessarily attributes subjectivity to some entities, while casting others as objects. There is no inherent logic to what entity is a person and what a thing, but this distinction—at least in the last instance—was produced politically. Thus, the apparatus of personhood operates even today like the mask of an actor, from which it derives its etymological meaning, in determining who has the right to act. Yet, and again just like the ancient theater mask, personhood tends to merge with the actor, making the end result seem almost natural and thus hiding its political origin.

The fact that personhood is always politically produced also means that not every human being is necessarily a person. This fact takes a completely new twist when it comes to international law. When Esposito writes about personhood, his starting point is obviously the human person. Certainly, personhood may be granted to other entities, such as corporations for example, and conversely, some human beings can be reduced to things—slaves, children, and women are only some historical examples, and the status of the fetus or a comatose patient are some contentious contemporary cases—but the rational human being is nevertheless the norm against which other persons are measured. Yet things are somewhat different in the case of international law. International legal personality has traditionally been enjoyed by states, whereas other entities have been viewed more or less as objects of international law.

It is therefore not surprising that international legal theorists have long sought to extend international legal personality to individuals and other non-state actors. This Article centers on the most recent such attempt, namely one of shifting international law towards a law of

¹ ROBERTO ESPOSITO, PERSONS AND THINGS: FROM THE BODY’S POINT OF VIEW 2 (2015).

² See *id.* at 16–17.

³ See *id.* at 81–85.

humanity and consequently positing the individual as the primary international legal person. This Article is not, however, that interested in a possible “discrepancy between the legal construction of the person and the natural reality of human individuality,” but rather focuses on attempts to draw borders between these two orders.⁴ In so doing, the Article seeks to perceive international legal personhood from the perspective of the two strands of persons/things discourse examined in Selkälä and Rajavuori’s Introduction to this special issue, namely the “multiple modes of existence” and “moral correctness” approaches.

As already mentioned—and as will be argued in more detail below—international law had for a long time a rather strong binary opposition between states, which enjoyed international legal personhood, and other entities. But international lawyers and scholars, of course, still saw individuals as persons in domestic law and in the philosophical sense, thus adopting subliminally a light form “multiple modes of existence” approach. Many contemporary critics of international law’s perceived state-centrism, approach the issue from the “moral correctness” viewpoint, deriving the international legal personality of individuals from their humanity, and making the legal personality of other entities dependent on their function to protect and serve that humanity. This present Article, however, is not particularly interested in the—admittedly important—topic of whether this or that entity falls into this or that category, but rather on the creation and use of the category itself, and in particular the outcomes of this use. While generally sympathetic to the law of humanity project, the Article suggests that simply changing the primary international legal person from the state to the individual might not achieve the desired result, for even in that case we still remain locked within the immunizing and exclusionary logic of personhood. Hence, the proponents of the law of humanity project should perhaps look elsewhere in their search for tools for change.

What follows in this article is divided into four sections. Section B provides a brief historical overview of legal personhood in international law. It introduces the traditional positivist conception, according to which individuals are objects (things) of international law, enjoying only a legal reflex, but also different attempts to change this conception. Section C focuses on the most recent and radical of such attempts, namely that of switching the focus of international law entirely from states to human persons, or what I call the “law of humanity project.” The section introduces different versions of this project and analyzes the role it gives to international legal personality in seeking to achieve the change towards “law of humanity,” that is to say a global legal order built around the human. I find that the contrast between the traditional state-centric notion of international law and the “law of humanity project” provides a fruitful variable into the discussion of international legal personality in the sense that most, if not all, other attempts to think about international legal personality are some sort of hybrid of these positions. Section D provides an immanent critique of the use of the concept of international legal personality as part of the “law of humanity” project.

⁴ See ALAIN POTTAGE & MARTHA MUNDY, *LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS* 1–39 (2004).

Drawing from Esposito's philosophical work on the concept of the person in general, as well as from Jan Klabbers's remarks on the more specific concept of legal personality in international law,⁵ the section makes three points. First, any use of the *dispositif* of person necessarily entails exclusions, and the "law of humanity" project's use of the *dispositif* is no exception in this respect. Second, whilst international legal personality might be too valuable to be discarded in granting political recognition to various groups, it might not be necessary for furthering the well-being and freedom of individuals. Hence, and third, it might be better to seek for more direct ways of governing the relation between law and life, and to narrow the role of international legal personality to only regulating the status of human collectives under international law. Section E concludes.

B. The Traditional Approach to International Legal Personality

In contrast to the naturalist tradition preceding it, modern positivist international law has typically been defined as a discipline, which deals with the rights and obligations subsisting between states. Ever since it was separated from natural law, the law of nations became inter-state law, which was not interested in individuals but treated the state as its primary juridical entity, viewing it as if it had a will of its own, completely separable from that of its members.⁶ Law of nations was no longer seen as (natural) law, which applies to individuals but as (positive) law applicable only to the relations between sovereign states, imagined as moral persons.⁷ From this also followed that international legal personality (ILP) was made the exclusive prerogative of sovereign states—although it must immediately be added that there were also at this time international scholars—such as Bluntschli, Le Fur, Heilborn, Martens, Verdross, and Westlake who advocated for at least some kind of ILP for individuals as well.⁸ ILP is generally used in international law to refer to "the capacity to be the bearer of rights and duties under international law,"⁹ or to competences attributed to designated actors within a systemic legal order.¹⁰ As Jan Klabbers writes, "international legal personality is thought to be a *conditio sine qua non* for the possibility of acting within a given legal

⁵ See Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35–66 (2005).

⁶ See KATE PARLETT, *THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW* 11–14 (2d ed. 2013); see generally EMER DE VATTEL, *THE LAW OF NATIONS* (2008).

⁷ See JANNE ELISABETH NIJMAN, *THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW* 83 (2004).

⁸ See Christopher Barbara, *International Legal Personality: Panacea or Pandemonium? Theorizing About the Individual and the State in the Era of Globalization*, 12 AUSTRIAN REV. INT'L EUR. L. 17, 33–35 (2007).

⁹ JAMES R. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 28 (2d ed. 2007).

¹⁰ See Matthew Craven, *On Statehood, Self-determination, and Recognition*, in *INTERNATIONAL LAW* 201–47, 215 (Malcolm Evans ed., 4th ed. 2014).

situation. Personality is considered to be a threshold, which must be crossed. Without legal personality, those entities do not exist in law.”¹¹

Kate Parlett helpfully summarizes the classical international law approach, which became dominant and uniform by the end of the 19th century, with a reference to the First Edition of Lassa Oppenheim’s hugely influential textbook *International Law: A Treatise*, published in 1905.¹² The principles guiding that book are, according to Parlett, that international law is a body of law governing relations between states; that individuals are under no circumstances subjects, but only objects under international law, comparable for example to territories; and that the only link between international law and individuals was through nationality, in that while states could *choose* to protect the interests of its nationals abroad—it by no means had the duty to do so.¹³

More or less the same approach to international law remained in the early 20th century and in the inter-war period. Whilst first Bierly, Kelsen, and Scelle,¹⁴ and later Lauterpacht and some of his contemporaries,¹⁵ held the individual to be the ultimate international legal person, capable of holding rights and obligations, such views remained rather marginal when it came to international legal practice.¹⁶ This is reflected most clearly in the *Danzig* case,¹⁷ which dealt with the issue of whether a treaty could grant rights to individuals. In a complicated decision, the Permanent Court of International Justice (PCIJ) stated that a treaty could provide some such rights when the parties to the treaty so specifically intend, but was careful to emphasize that a treaty “cannot, as such, create direct rights” for individuals.¹⁸ Thus, as Parlett notes, the Court upheld states’ “monopoly on access to the international system and their status as gatekeepers of international rights and duties.”¹⁹

¹¹ Klabbers, *supra* note 5, at 37.

¹² See LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE (1905).

¹³ See PARLETT, *supra* note 6, at 13–16.

¹⁴ See Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, in THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 18–19 (2004).

¹⁵ See NIJMAN, *supra* note 7, at 297–325; PETERS, *supra* note 14, at 20–21.

¹⁶ See ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 126–72 (2010).

¹⁷ Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, Against the Polish Railways Administration), P.C.I.J. (Ser. B) no. 15 (Mar. 3, 1928).

¹⁸ See *id.* at 17–18.

¹⁹ PARLETT, *supra* note 6, at 25.

In this very classical conception of international law, legal personhood was made the exclusive prerogative of states. According to the so-called “object theory,” individuals could not be right-holders under international law, but only enjoy a legal reflex.²⁰ In this sense, the conception corresponded more or less to Esposito’s description of the persons/things dichotomy, with the curious twist that persons were not rational human beings but sorts of corporations—in this case the very complex corporations called states. As Janne Nijman writes, international legal personality “indeed functioned like a mask, a shield at times, or a façade at others, that divided the international from the internal situation.”²¹ It is not too huge a leap to argue that individuals were treated more or less as things from the perspective of international law. They had no rights or obligations under international law and could not access international courts. Even Lauterpacht’s 1955 version of Oppenheim’s *International Law* still answered the question about the position of individuals in international law by stating simply that “[t]he answer can only be that, generally speaking, they are objects of the Law of Nations.”²²

It would however be completely ludicrous to claim that international lawyers saw individuals as things. That was obviously not the case. Rather, I would argue that international lawyers approached—likely without conceiving it so—the personhood of individuals from the “multiple modes of existence” perspective, presented by Selkälä and Rajavuori in the Introduction to this special issue. As Selkälä and Rajavuori write, this approach gives several “modes of existence” for an entity, which seems to have only one such mode in the “empirically perceivable reality.” Thus, under this approach, an entity can be both a thing and a person, depending on the external mode of inquiry, possibly leading to a “layered narrative of thinghood,” which is free from making value-judgments based on the legal status of entities in various contexts. In other words, any international lawyer certainly understood that individuals are persons from the perspective of domestic law and philosophy. But this was not in conflict with the fact that individuals could have their cases heard in international tribunals only if their home state wished to represent their interests through the doctrine of diplomatic protection. Furthermore, even if a violation was found, the violated party was seen to be the representing state, not the represented individual—as if the individual were little more than the state’s damaged property. Indeed, even after the PCIJ decided that states could grant individuals rights in certain situations in the *Danzig* case, this was only when states so specifically intended.

Much has of course changed in international legal practice and theory since the First Edition of Oppenheim’s *International Law* or the *Danzig* case. It is now generally accepted that “to the extent that entities other than states ‘directly possess’ rights, powers and duties in

²⁰ George Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT’L L. 428–49 (1952).

²¹ NIJMAN, *supra* note 7, at 469.

²² LASSA OPPENHEIM, INTERNATIONAL LAW 636, 639 (Lauterpacht 8th ed. 1955); *see also* GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 35, 53–54 (1947).

international law” they can be regarded as subjects of international law.²³ Furthermore, these rights and obligations are now endowed to individuals under human rights law, humanitarian law, international criminal law, as well as to different entities for example under international investment law,²⁴ international organizations law, and international environmental law. Thus, it is sometimes suggested that the old subjects/objects distinction within international law has collapsed as it has been accepted that international legal persons are not identical, but rather form a spectrum, starting from the state as a full subject of international law and leading to NGOs, which are recognized as subjects by some intergovernmental organizations.

Yet, discontent remains among many contemporary international lawyers about the way international law perceives legal personhood and treats individuals. While it is true that individuals and other actors now have some sort of legal personality in many areas of international law, there are also many important areas where they do not, including much of the UN system, most notably the International Court of Justice. Furthermore, confusion remains about how the increased inclusion of the non-state might be theorized and systematized. As Akerhurst remarked in his influential textbook, the practical extension of rights and duties to non-state actors during the Cold War period was conducted, in the attempt to avoid controversies, without much theoretical deliberation.²⁵ And indeed—as illustrated in this special issue in Rajavuori’s analysis of the porosity of international legal personality in investment treaty arbitration—international law seems to still lack a commonly accepted theory which would coherently describe the relation of a subject to the international legal system.

There are, nevertheless, several candidates for such a theory.²⁶ Some have argued that what should matter is the actual capacity of an entity to engage in the international legal system in a given context, and that we should therefore get rid of the problematic notion of legal personhood altogether.²⁷ According to the New Haven School, for example, there are no subjects and objects of international law, but only participants to it, this including individuals.²⁸ Others, drawing from Kelsen’s conception of legal personhood as the “personified unity of a set of legal norms,” insist on the importance of legal personhood, but

²³ See PARLETT, *supra* note 6, at 353–54.

²⁴ See Mikko Rajavuori’s chapter in this volume, 18 GERMAN L.J. (2017).

²⁵ See MICHAEL AKERHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 70 (rev. ed. 1987).

²⁶ For an overview, see PORTMANN, *supra* note 16, pt. II.

²⁷ See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 50 (Clarendon Press ed. 1995).

²⁸ See MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1977).

argue that anyone can be a person, for personhood is acquired whenever an international norm grants rights or obligations to an entity.²⁹ Still others argue that human rights and humanitarian law have changed the interpretation of international law so that it now recognizes individuals as legal persons.³⁰

C. The Law of Humanity Project

In what remains of this Article, I am specifically interested in the latest and most radical attack on the old system of international law—one that has, as its goal, a completely humanized international law; or perhaps more fittingly a (global) law of humanity. The vision of a law of humanity draws from the aforementioned attempts to rethink international law, but is also distinguishable from them. Anne Peters argues, for example, that the aforementioned attempts to rethink international legal personhood are still insufficient because they have trouble recognizing the individual as a full international legal person. If ILP is taken to be enjoyed by those entities, which enjoy an adequate *amount or density* of rights to give them certain freedom of action under international law, then individuals would fall under a gray area: They might not yet have enough rights to meet the threshold of freedom, but on the other hand those rights are rapidly increasing. If, on the other hand, ILP were to require rights, which have the right *substance*, such as the right to conclude treaties or join international organizations, then individuals would not qualify at all. The same would be true if ILP were to require certain capacities, as individuals do not, at the moment, have the same capacities as states in the international sphere.³¹

Similarly, Christopher Barbara argues that graduated ILP and international capacity rely on state action and hence “differ mainly on nomenclature and on where to draw the line between being an international legal person and everything else.”³² While individuals and other non-state actors might be argued to enjoy ILP of some sort, in that they may, for example, appear in certain international courts, such as human rights courts,³³ these are, according to Barbara, “secondary grants of circumscribed ILP and not equivalent to the ‘full’ ILP exercised by States.”³⁴ Hence, “if individuals were granted full and formal ILP on the same

²⁹ See PORTMANN, *supra* note 16, pt. III.

³⁰ See ANTONIO AUGUSTO CANCADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND* (2010); THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006); ANTONIO CASSESE, *INTERNATIONAL LAW* 165–66 (2d ed. 2003).

³¹ See PETERS, *supra* note 14, at 36–38.

³² Barbara, *supra* note 8, at 25.

³³ See *id.* at 23.

³⁴ *Id.* at 23–24.

hierarchical level as the state, it would have to be one specially adapted for them – in other words, a new type of ILP.”³⁵

What unites the authors studied here is the idea that the individual should not only have personhood under international law—he or she should be *the* primary international legal person, the foundation of the system. Similarly, considerations of humanity should not only play an important part in interpretation of international law—humanity should be the leitmotif of international law. This also entails either diminishing, or at least radically rethinking, the role of the state, as sovereignty is derived from humanity.³⁶ According to Barbara, for example, the greatest problem of the international legal system is that the preeminent role is reserved for a legal fiction—the state—rather than the human person. This is doubly so when it comes to ILP for at that point we are “faced with a legal abstraction [ILP] centred upon yet another legal abstraction – the state!”³⁷ In Barbara’s mind, it is “extremely problematic to have at the centre of our legal order something which amounts to nothing more than a figment of our imagination.”³⁸

If international law has traditionally approached legal personhood from the “multiple modes of existing” perspective, the proponents of the global law of humanity seem to take, then, the “moral correctness” approach, which has indeed been commonly used to criticize and transform existing categories of law. As Selkälä and Rajavuori explain in their Introduction, this approach draws inspiration from the rules/principles distinction made first by Dworkin, and further developed by Alexy. According to Alexy, law always has two dimensions: A factual and an ideal one. The former corresponding more or less to rules as they are and the latter to the principles and aspirations behind those rules. The relation between the two is such that the ideal world of law allows the critique of existing rules, if they lead to outcomes differing from the principles behind them.³⁹ This approach therefore allows a critique of law’s borders by questioning the morality of existing rules. This is indeed more or less what authors, such as Domingo and Barbara, are doing, emphasizing the “perverse” outcomes of attributing international legal personality exclusively to states and invoking the underlying general principles of law. This approach radically changes how entities are divided into persons and things in international law. Yet in a way, as I will argue in more detail in the next section, it returns us (in good and bad) back to Esposito’s starting point where the human person acts as the model of legal personhood.

³⁵ *Id.* at 29.

³⁶ See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 514 (2009).

³⁷ Barbara, *supra* note 8, at 45.

³⁸ See *id.* at 47.

³⁹ See ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS Chapter 44–111 (2010).

It is worth emphasizing, however, that there is no uniform vision or clearly defined project of a global law of humanity. Rather, it consists of different ideas and arguments, emerging here and there among academics, activists, and even some practitioners, but connected through the aforementioned common thread of replacing states with human persons as the primary subjects of global law. At least three well-developed approaches can be identified in academic literature. The first approach is abstract and prescriptive, imagining and advocating for a new global law of humanity as a system of systems, built around the human person. This approach is represented in its most detailed form in Domingo's *The New Global Law*.⁴⁰ Projecting his vision against the background of a world globalizing at a dizzying speed, Domingo argues that globalization has brought new threats that the current international legal system cannot answer, but also new possibilities for overcoming that system. Domingo's project is therefore one of actively changing the world in the face of new threats. Law must be changed, or else it might become "hostage to outmoded, transient paragons." This is, for Domingo, "a moral obligation," which can be accomplished only by creating a system of global law,⁴¹ as sovereign nations—which, Domingo admits, were once useful—become incapable of taking care of humanity's needs in a globalized world. Instead of states, the new global law of humanity would be built around the human person. The human person constitutes the normative foundation of the new global legal order. As Domingo writes, "[t]he global order rests on the human being, specifically on the unique dignity of the individual and collective human person, the true spring of liberty and equality among all human beings."⁴² If state sovereignty was the foundation of international law, the person is the foundation of the new global law. In the new system, it is the individual, and certainly not the state, which should hold primary legal personhood.

Barbara takes a similar approach, deriving the need for radical changes in international law from globalization. Unlike Domingo, however, Barbara does not highlight the new threats generated by globalization, but rather the possibilities it creates for communication. A state-centric international legal system may have made sense in a time when people could not communicate directly with each other, making ambassadors and other state officials the most efficient way to handle international relations. This is however no longer the case because individuals can exercise directly their "innate interest in interacting with other human beings."⁴³ The time has therefore come to shift the focus of international law from the legal fiction—called the state—to the source and end of all law, the human being. As Barbara writes, "[t]he very name 'international legal personality' portrays remarkable irony as the original 'prototype' legal person – the human being – is only accorded a minor rank in

⁴⁰ See RAFAEL DOMINGO, *THE NEW GLOBAL LAW* (reprinted ed. 2011).

⁴¹ See *id.* at xiv.

⁴² *Id.* at xxi.

⁴³ Barbara, *supra* note 8, at 55.

the dominant definition of ILP.”⁴⁴ Hence, “[b]uilding a system based on the human being was, and remains, an obvious and relevant basis around which to order the discipline of international law.”⁴⁵

The second approach, by contrast, does not necessarily seek to replace the traditional system of international law with a completely new system. It does, however, open another way of thinking about the relation between the individual and the state, while nevertheless retaining close relations with the global law of humanity idea. This approach aims at the humanization of the existing international law by shifting the system’s fundamental source of the legitimacy to humanity and the human person. The argument is made perhaps most famously by Anne Peters who states that sovereignty has been ousted from its position at the helm of international law and replaced by humanity. As she writes, sovereignty is now “derived from humanity, understood as the legal principle that human rights, interests, needs, and security must be respected and promoted, and that this humanistic principle is also the telos of the international legal system.”⁴⁶ This change is, according to Peters, reflected in international practice and *opinio juris*, which has crystallized “an original [primary] international legal personality of the human being.”⁴⁷ As Peters argues, “[i]ndividuals, not States, have become the natural persons under international law.”⁴⁸ This does not deprive states of their international legal personhood, but it does make it dependent on the state fulfilling its duty to act as a trustee,⁴⁹ official,⁵⁰ or fiduciary⁵¹ of humanity.

Janne Nijman, too, connects her rethinking of ILP to the more general rethinking of state sovereignty. According to Nijman, “we should embrace ILP as a locus of change in our

⁴⁴ *Id.* at 17–18.

⁴⁵ *Id.* at 37.

⁴⁶ Peters, *supra* note 36, at 514.

⁴⁷ *Id.* at 551.

⁴⁸ *Id.* at 552.

⁴⁹ See Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295 (2013).

⁵⁰ See Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315–43 (2011).

⁵¹ See EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016). On the fiduciary turn in law, see *CONTRACT, STATUS, AND FIDUCIARY LAW*, (Paul B. Miller & Andrew S. Gold eds., 2016); Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique Essay*, 125 YALE L.J. 1820–879 (2015); *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW*, (Andrew S. Gold & Paul B. Miller eds., 2014); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671–739 (2012).

thinking about international law and its identity today.”⁵² More specifically, ILP “can help us turn the fundamental relationship between the individual, the state, and the international community around.” According to Nijman, legal personality is necessary for a humane life, for it guarantees the possibility to participate in common political life. As such, it is a natural right of every human being.⁵³ As a consequence of globalization, however, the political is as much international as national. Hence, the human person has to be a “citizen” of the international community as well, meaning that he or she must be granted international legal personality. If states fail to protect this right of an individual, then the international community must take responsibility and “transform him back from thing to person.” Not unlike Peters, Nijman derives then from this a kind a ILP version of “sovereignty as responsibility” or “responsibility to protect,” according to which the state derives its ILP from that of its citizens, and has it only as long as it “functions well and its citizens are represented properly by the government.” Conversely, the state loses this ILP if it “fails, collapses or falls victim of civil war or the oppression of minorities,”⁵⁴ at which point the correlative responsibility to protect the legal personality of the individual falls on the “institutionalized international community.”⁵⁵

Finally, there is a sort of hybrid of the aforementioned approaches. This final approach starts from empirically observable trends in current international and domestic law, and tries to combine these so that they form a new spontaneously created global law. This vision is developed furthest in Ruti Teitel’s *Humanity’s Law*. According to Teitel, “[a]cross a broad swathe of areas—including politics, law, economics, ethics, and public health—a vital vision is emerging, which depends on a threshold consensus on the need to guarantee the humane treatment of persons and peoples, and ensure their preservation.”⁵⁶ This vision, according to Teitel, is humanity’s law, which can be defined quite simply as “the law of persons and peoples.”⁵⁷ In other words, humanity’s law entails a shift away from international law, dominated by state-centric, territorialized rule of law values, and toward a global legal vision focused on the protection of individuals and peoples. Humanity’s law therefore has three key features. First, humanity’s law operates largely on individuals, granting them rights, but also giving them obligations. In other words, it sees the individual as the primary international legal person. Second, humanity law “implies a standard of treatment that is

⁵² NIJMAN, *supra* note 7, at 456–57.

⁵³ *See id.* at 467.

⁵⁴ *Id.* at 468.

⁵⁵ *Id.* at 468.

⁵⁶ RUTI TEITEL, *HUMANITY’S LAW* 17 (2011).

⁵⁷ *Id.* at x.

based on humanity as both the subject and object of action.” Finally, “humanity law’s orientation or telos is the preservation of humanity.”⁵⁸

To conclude this description of the global law of humanity approach to ILP, I want to make explicit the role that the authors studied above attribute to ILP. As has been hinted here and there above, the proponents of this approach do not argue so much that recognizing the ILP of the individual is important because a certain set of rights could be derived from (although this might certainly be part of it), rather, they argue the importance of the recognition lies in the change it can bring. As mentioned above, Nijman argues that ILP can turn the relations between the state, the individual, and the international community around,⁵⁹ and according to Barbara, we have to alter the way we perceive ILP for its current state-centric definition hinders international law’s development of a more human-centric direction.⁶⁰ Peters is perhaps the most precise in this regard. According to Peters, the importance of the recognition of the individual’s primary legal personality lies in that it would help to organize the law and bring about change.⁶¹ Once we stop looking at the qualities of states and drawing distinctions between them and all other international legal entities, and thus pointing out the deficiencies of those other actors, we might start to perceive international law, or perhaps rather global law, differently. For Peters, the recognition of the ILP of the human being “is an expression of normative individualism,” with which she means, “that politics and law ultimately should be guided and justified by the concerns of the persons affected by them.” Whilst individuals might live in communities and have collective goals, these goals must “ultimately be measured by the needs and interests of the persons affected and are not an end in themselves.” The project furthermore “presupposes that the welfare of the human being is a universal concern and a task of the entire international community.”⁶² ILP would not therefore have to generate some set of rights and duties. Instead, ILP is a capacity, which precedes any ownership of rights. The attribution of rights therefore merely confirms that an actor is a person under international law, but does not constitute it. As Peters writes, ILP “can in theory be entirely empty or without function if no specific rights are granted”: It is a *potential*—“but one that is essential to the emancipation of the human being.”⁶³

⁵⁸ *Id.* at 19.

⁵⁹ See NIJMAN, *supra* note 7, at 456–57.

⁶⁰ See Barbara, *supra* note 8, at 18.

⁶¹ See PETERS, *supra* note 36, at 40–41.

⁶² *Id.* at 553–54.

⁶³ *Id.* at 58–59.

**D. International Legal Personality as a Tool for Change in the Law of Humanity Project:
Some Critical Remarks**

Much could be said both in favor, and against, the projects of global law of humanity and normative individualism, about their potential and their imminent dangers, but I do not have the possibility to engage in such analysis within the scope of this article. I will, in what follows, restrict myself to making some remarks on the usefulness of ILP as a catalyst for or tool of the projects. In so doing, I take the aim of the projects to be human freedom (emancipation) and well-being. I will therefore assess ILP against these aims.

To begin with, I would like to delve a little bit deeper into Esposito's critique of the concept of person, which I started with in this Article, as well as the more general thought behind it. The moral, humanity-based critique is certainly correct to point out that the traditional approach to ILP tended to reduce human beings to things, at least on the theoretical level. Yet, what Esposito's critique of personhood reveals is that even the moral approach to ILP remains within the same conceptual framework as the previous one, and therefore raises some doubts about the usefulness of the concept of ILP as part of the law of humanity project. In fact, Esposito's critique becomes even more apt in this new paradigm. As was mentioned in the Introduction, Esposito's work on personhood is tailored especially for the domestic context—where the rational human being is the quintessential person. Whereas international law traditionally provided an exception to this framework by replacing the individual with the state in that role, the humanization of international law movement is shifting that position, bringing international law closer to its domestic version and thus making Esposito's work increasingly relevant also from the perspective of international law scholarship. Moreover, Esposito's work deals with conceptual themes such as sovereignty, community, individualization, and globalization, which are at the heart of the humanization of international law literature and the moral approaches to ILP.

Esposito's work on personhood builds on his more general work on the dynamics of community and immunity in philosophy, political theory, and law. In *Communitas*,⁶⁴ Esposito studies the simultaneous necessity and impossibility of community. Community is necessary in that we have always existed, and will always exist, in common, but impossible in the sense that it can never be fully realized. Not unlike Jean-Luc Nancy—whose work Susanna Lindroos-Hovinheimo discusses at length in her article in this special issue⁶⁵—Esposito argues that community is not some definable thing, but rather a no-thing, an unpayable debt or lack. As such, it always threatens to sweep away individual life and difference, to sacrifice the self for the common. For these reasons, at the heart of modern philosophy and political theory is the attempt to immunize life against the negative effects of community. These

⁶⁴ ROBERTO ESPOSITO, *COMMUNITAS: THE ORIGIN AND DESTINY OF COMMUNITY* (2010).

⁶⁵ See Susanna Lindroos-Hovinheimo's chapter in this volume, 18 GERMAN L.J. (2017).

attempts are the topic of Esposito's *Immunitas*.⁶⁶ Immunization divides the community, protecting individuals from the demands of community. This logic of immunity is behind concepts such as sovereignty, property, rights, and even personhood. But while the aim of immunity is to protect individuals by negating the community's most dangerous effects, it tends to go too far and ends up negating both community and life itself. At the heart of Esposito's philosophy is the attempt to find a reciprocal relation between community and immunity, where community refers to difference and immunity helps to produce life and protect it from too much protection.⁶⁷

Whether we attribute legal personality to the sovereign state or to the individual, we remain within the same conceptual framework in Esposito's theory. ILP of course protects the individual from being reduced to a thing by the state-centric international order. But it also protects states (and consequently its citizens) against the negative effects arising from globalization. The sovereign state is an immunizing mechanism of its own, protecting its citizens from each other by centralizing power, but it also needs an immunizing mechanism, ILP, to protect itself—or rather its population—against dangers from globalization and the larger international community. As was mentioned above, globalization is an important theme in the literature on humanization of international law and moral approaches to ILP. For some authors, globalization entails new risks that the state cannot answer and therefore increases the pressure of recognizing the ILP of the individual, whereas others come to the same conclusion by emphasizing the increased possibilities of human beings to communicate with each other. Esposito's thought has some links to both perspectives, without fully agreeing with either. While acknowledging the new possibilities of pluralization and communication opened by globalization, he nevertheless also sees a threat of further immunization: Globalization is “immunization driven to the sole principle of the regulation of individual and collective life in a world made identical with itself—made ‘global.’”⁶⁸ Indeed, globalization is in many ways normalizing. It is “a planetary power that meets no resistance or difference that it doesn't make a part of itself or subsume within its own model.” Globalization certainly facilitates new ways of being in common by allowing the exchange of ideas, languages, and technologies. But the stronger these processes are, the more necessary preventive immunization also becomes. “The more the ‘self’ tends to make itself ‘global,’ the more the self must struggle to include inside what is outside: The more the self tries to introject every form of negativity, the more negativity is reproduced.”⁶⁹

⁶⁶ See ROBERTO ESPOSITO, *IMMUNITAS: THE PROTECTION AND NEGATION OF LIFE* (2011).

⁶⁷ See e.g., ROBERTO ESPOSITO, *BÍOS: BIOPOLITICS AND PHILOSOPHY* (2008).

⁶⁸ ROBERTO ESPOSITO & RHIANNON NOEL WELCH, *TERMS OF THE POLITICAL: COMMUNITY, IMMUNITY, BIOPOLITICS* 46 (2013).

⁶⁹ *Id.* at 60.

The need to immunize ourselves against the adverse effects of globalization is an almost natural and necessary reaction. But to recap, the problem is that in protecting life, the modern immunity mechanisms also end up negating it. Personhood is one such mechanism, protecting some forms of life at the expense of others. According to Esposito, the concept of person “is born negatively from its presumed difference from men and women who are not persons, or who are only partially and temporarily persons and as such always at risk of falling into the status of thing.” As Esposito points out, no one was a person all their life in ancient Rome. And since then, too, some groups of people throughout history have been excluded from full personhood, be they slaves, women, colored people, children, or something else.⁷⁰ This is also true in the case of contemporary international law. As Barbara notes ILP is in fact,

a regulatory concept; its *raison d’être* is essentially to limit participation in a legal system. In fulfilling its role as regulator, legal personality engages in a process of selective personification. This is merely the flip-side of the technical mandate of legal personality: to empower one must necessarily exclude as capacity can only exist as a correlative to incapacity.⁷¹

Moreover, the history of the concept of person is not only about “the distinction among persons, semipersons, and nonpersons” but also about “elaborations of intermediate situations, zones of indistinction, and exceptions that regulate the movement, or the oscillation, from one status to another.”⁷² To be sure, many of these movements have been welcomed in the sense that more and more entities have been included within the category of the person. But the apparatus of person also always necessarily excludes some entities. This is true when it comes to distinctions between states versus the rest, or between some individuals or corporations and others, but also within individuals themselves, “between the status of the person and the body of the human being into which it is implanted.” Personhood relies on “a sort of excess, of a spiritual or moral character, that makes more of the ‘person’, yet without letting it coincide completely with the self-sufficient individual of the liberal tradition.”⁷³ As Esposito explains,

⁷⁰ See Joseph Vining, *Dignity as Perception: Recognition of the Human Individual and the Individual Animal in Legal Thought*, in UNDERSTANDING HUMAN DIGNITY 573, 581 (Christopher McCrudden ed., 2013).

⁷¹ Barbara, *supra* note 8, at 23.

⁷² ROBERTO ESPOSITO, *THIRD PERSON: POLITICS OF LIFE AND PHILOSOPHY OF THE IMPERSONAL* 115 (2012).

⁷³ *Id.* at 70–71.

[o]nly a nonperson, or a living material that is not personal, can give rise to something like a person as the background and the object of another's sovereignty. Over time, however, the person is such only if he or she reduces a part, or the whole, of his or her body to the thing.⁷⁴

Considering the inherently exclusionary nature of the concept of personhood, including ILP, it is worth asking how necessary is ILP for the project of humanizing international law? As previously mentioned, the proponents of the project do not seek to derive any specific set of rights from the status. Yet, where they do think ILP still plays a crucial role is as a kind of pre-existing empty platform on which the rights can be attached and which enables the participation of the individual in international law and politics. But is even this kind of empty notion of ILP really necessary for participation in international law? Is ILP really a threshold, which has to be crossed for an entity to be able to act in a given legal situation? Jan Klabbers would argue that it is not. Klabbers points out that an entity does not in reality need ILP at all for most international legal acts, such as to make unilateral promises, impose conditions on others, or even violate international law. In fact, the reality is that all kinds of entities tend to act on the international plane irrespective of whether they are endowed with ILP or not.⁷⁵ The obvious counterargument against this is of course the possibility to appear in courts, and Klabbers does indeed admit that something like legal personality is needed to be able to sue. Nevertheless, he argues that this derives more from rules on standing than from legal personality and can therefore be altered one way or the other by tweaking these rules. Klabbers therefore concludes that ILP does not in fact constitute a threshold for performing legal acts.

This neither makes ILP useless, however, nor does Klabbers argue so. Klabbers argues instead that the true relevance of legal personhood is more political than legal and has to do mostly with groups. Where legal personality really matters is in that it signals that a group is worthy of recognition. Human beings tend to live and act in groups, be it football clubs, trade unions, churches, universities, associations, or something else. Legal personality is important for these groups in two ways. First, it entails that the group is taken seriously, not only in the symbolic sense, but also more concretely in struggles over scarce resources. Second, in a rather immunitary vein, the group is shielded, at least to some extent, from outside interference, granting it some amount of self-determination.⁷⁶ In sum, "by allowing groups to band together for what purpose and under whatever banner, the law facilitates the conduct of politics [as well as commerce] in a stylized form."⁷⁷

⁷⁴ *Id.* at 116.

⁷⁵ See Klabbers, *supra* note 5, at 37, 56–57.

⁷⁶ See *id.* at 61–64.

⁷⁷ *Id.* at 65–66.

These remarks cast some shadows over the use of ILP as part of the law of humanity project. Esposito's work demonstrates that, philosophically, any approach, which relies on the concept of person remains within the same immunitary framework, irrespective of whether legal personality is granted primarily to the individual, the state, or some other actor. Esposito's critique certainly admits the importance of the concept of the person, but emphasizes that personality of some is gained only by casting other into things. Esposito therefore seeks to find alternative ways to conceptualize our philosophical, political, and legal world, drawing, for example, from Simone Weil's work on the impersonal,⁷⁸ and on Gilles Deleuze's and Felix Guattari's notion of "becoming-animal,"⁷⁹ in the hope of loosening "the metaphysical knot that is bound by the idea, and practice, of the person in favor of a way of being human that no longer moves toward the thing but finally coincides with only itself."⁸⁰

It is worth emphasizing, however, that even Esposito himself admits that these alternatives are extremely difficult (and possibly impossible) to turn into the practice of law and politics. Indeed, there are always dangers in making overly far-reaching conclusions on the basis of philosophical musings and theories, as important as they might be to shedding light on the problem of concepts and practices we tend to take for granted. It is therefore important to always pose the question of what do we lose by letting go of this, or that, established concept. In the case of ILP, however, the answer might actually be "not that much"—at least legally speaking. As Klabbers's analysis of legal personhood shows, the true relevance of the concept lies in granting recognition and certain form to human groups; even though it is not really necessary for participation in the legal sense. As such, legal personhood might be important for groups, but not necessarily so much for individuals. In fact, Jens David Ohlin's analysis of human rights cases suggests that "[r]ather than illuminating human rights claims, the concept of the person often obscures them," causing Ohlin to conclude that the concept is not necessary or even useful in these cases.⁸¹ By contrast, Ohlin, too, identifies some of those problems emphasized in Esposito's work (without drawing in any way from Esposito). In most situations the problems of the concept of personhood remain safely hidden as we use the concept simply to identify "people." Yet, in those situations when decision-makers are put under real pressure and the concept is supposed to do the most work, it tends to

⁷⁸ See SIMONE WEIL, SIMONE WEIL: AN ANTHOLOGY 49–79 (Sian Miles ed., First Grove Press ed. 2000).

⁷⁹ See GILLES DELEUZE & FÉLIX GUATTARI, 1730: Becoming-Intense, Becoming-Animal, Becoming-Imperceptible..., in A THOUSAND PLATEAUS CAPITALISM AND SCHIZOPHRENIA at 232 (Brian Massumi trans., 2008).

⁸⁰ ESPOSITO AND WELCH, *supra* note 68, at 122.

⁸¹ See Jens David Ohlin, *Is the Concept of the Person Necessary for Human Rights*, 105 COLUM. L. REV. 209, 212 (2005).

become exclusionary and ambiguous as we do not know whether it refers to bodies, minds, or agents.⁸²

What the above analysis suggests is that the proponents of the global law of humanity project should perhaps seek to achieve their aims—that is to say, human emancipation and well-being—through some means other than ILP. While it is probably not wise to let go of the concept of ILP altogether, as Esposito might suggest, it could be beneficial to give it only a secondary role in international law, more precisely the role of helping groups of various kinds to gain political recognition. But the status of the individual should perhaps be furthered in some other way so as to avoid the exclusionary, potentially dangerous effects of the apparatus of person as much as possible. Indeed, although authors such as Nijman are correct to state that “[t]he human subject precedes the state in its existence and has not become a person by social contract,” this only poses the question of why should we then make such an issue of their legal personality. Does this not only confuse the protection of their freedom and equality? Why argue that there is “a natural right to be a person?”⁸³ Should we not rather seek to establish a more direct link between life and law—without the mediator “person”—if we want to achieve human freedom and well-being?

E. Conclusion

This Article started with Roberto Esposito’s note that the *dispositif* of person divides our philosophical and legal world into two camps: Either an entity is a person or it is a thing. Drawing from this notion, the article has studied legal personality in international law, and in particular its usage by the law of humanity project, which seeks to challenge the way international lawyers have typically theorized ILP. In contrast to domestic law, which acts as Esposito’s reference point, international law traditionally attributed legal personality not to the rational human person, but to a corporation—namely the state. Employing a form of the “multiple modes of existence” approach, international lawyers reduced the individual more or less to a thing in the eyes of international law, even though these lawyers have certainly not seen the human as a thing in the more philosophical sense. The proponents of the law of humanity project, by contrast, have employed the “moral correctness” approach to argue that the individual should be the primary international legal person, whereas states enjoy ILP only to the extent that they fulfill their function of protecting human life, rights, and well-being. In particular, these authors sought to harness ILP as a tool for producing change and transforming international law into a law of humanity.

This Article has not taken a stance on whether a shift from international law to law of humanity is a good idea or not. Rather, it focused on the question of whether ILP can fulfill the hopes of the project’s proponents, that is to say, on whether ILP can help to increase

⁸² See *id.* at 231.

⁸³ NIJMAN, *supra* note 7, at 466.

human freedom and well-being. My fear is that it cannot. This is so especially because whether we attribute ILP to the state or the individual, we still remain within the same theoretical framework in which the *dispositif* of person necessarily excludes some forms of life while protecting or empowering others. In fact, the *dispositif* of person is especially problematic when it comes to human beings, for it tends to create a *caesura* within the human, between the rational side, to which personality is attributed, and the “animal” side, which is then reduced to a thing, thus ignoring the “body’s point of view.” This Article suggests therefore that while we should not discard ILP entirely—for its role of granting political recognition to various groups might be too valuable to lose—the proponents of law of humanity should perhaps seek more direct ways of governing the relation between law and life when it comes to individuals. A good starting point for such a search could perhaps be found in this special issue in Susanna Lindroos-Hovvinheimo’s rethinking of subjectivity and community in the EU through Jean-Luc Nancy’s conception of singular plurality.⁸⁴

⁸⁴ See Lindroos-Hovvinheimo, *supra* note 65.